No. 89-740

In The

Supreme Court of the United States

October Term, 1989

EVELYN S. MIURA and DAYNA HU,

Petitioners,

vs.

WESTERN UNION INTERNATIONAL, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether employees covered by a collective bargaining agreement must exhaust the grievance and arbitration procedure established in such agreement before suing their employer on the ground that the agreement entitles them to additional payments upon separation from employment.

LIST OF PARTIES

The parent of the Respondent, Western Union International, Inc. ("Company"), is MCI, International, Inc., whose parent is MCI Communications Corp. The sole subsidiary of the Company which is not wholly owned is Western Union International, S.A.

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The Petitioners seek review of an unpublished Memorandum Decision issued by the Ninth Circuit Court of Appeals. Appendix 1 to the Petition sets forth the Decision with several clerical errors irrelevant to the Petition. The accurate text of the Decision is available in Westlaw.

STATUTES INVOLVED

This case involves Section 301 of the Labor Management Relations Act of 1947 ("LMRA"), 29 U.S.C. §185, which states:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Id.

Petitioners Evelyn S. Miura and Dayna Hu ("Employees") assert that this case involves Haw. Rev. Stat. §388, which states in relevant part:

> §388-2 *Semimonthly payday.* (a) Every employer shall pay all wages due to the employer's employees at least twice during each calendar month, on regular paydays designated in advance by the employer, in lawful money of the United States or with checks convertible into cash on demand at full face value thereof; [. . .]

> (b) The earned wages of all employees shall be due and payable within seven days after the end of each pay period.
>
> §388-11 *Employees remedies.* (a) Action by an employee to recover unpaid wages may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of oneself or themselves, or the employee or employees may designate an agent or representative to maintain the action.

Haw. Rev. Stat. §§388-2(a)(b) and 11(a) (1988).

The Employees also assert that this case involves Sections 6 and 16 of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§206 and 216, which are partially set forth in the Petition at 4, and in 1967 provided a minimum wage of $1.40 per hour. H.R. 13712, 89th Cong., 2nd Sess. (1966), *reprinted in* 1966 U.S. CODE CONG. & ADMIN. NEWS, 978, 986-987, 994.

STATEMENT OF THE CASE

Subject Matter Jurisdiction

The United States District Court for the District of Hawaii ("District Court") had subject matter jurisdiction over the Employees' suit under Section 301 of the LMRA, *supra*, because the claim required interpretation of the collective bargaining agreement ("Agreement") between the Employees' union, Local 111 of the American Communications Association, Communications Trade Division, International Brotherhood of Teamsters ("Union"), and the Company. *Lingle v. Norge Div. of Magic Chef*, 486

U.S. 399 (1988); *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985); *National Metalcrafters Div. of Keystone Consol. Indus. v. McNeil*, 784 F.2d 817 (7th Cir. 1986).[1]

Material Facts

When the Company laid off the Employees in December 1984 and January 1985, it paid them severance pay provided by the Agreement in the amounts of $22,350.00 and $25,702.50, respectively.

Sixteen months later, in May 1986, the Employees sued on the ground that the Agreement also required the Company to pay the Employees cost of living differentials on the severance pay of $3,360.00 and $3,864.00 respectively, and pay Employee Miura wages for her first week of work in September 1967 at the rate applied during her last week of work in January 1985 of approximately $600.00.

Neither the Employees nor their Union processed the claims asserted in this case through the Agreement's grievance and arbitration procedure.

Grounds for Decisions Below

The District Court interpreted the Agreement as applied by the Company, holding that it did not

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[1] The District Court did not have subject matter jurisdiction under Sections 206 and 216 of the FLSA, *supra*, because Employee Evelyn S. Miura ("Miura") sought additional payments upon separation from employment under the Agreement, and did not allege that the Company failed to pay her the minimum wage of $1.40 per hour provided by Section 206 of the FLSA, *supra*, in 1967.

provide for a cost of living differential on severance pay or a deferral of first week's wages.[2]

The Ninth Circuit Court of Appeals affirmed the District Court, on the alternate ground that the Employees failed to exhaust the applicable grievance procedure, and that any claims for wages earned during a week in September 1967 under Haw. Rev. Stat. §388 or Section 6 of the FLSA, *supra*, were time-barred.[3]

REASONS FOR DENYING THE WRIT

There is No Conflict Over the Exhaustion Rule

There is no conflict between the circuits regarding the question whether employees must exhaust grievance and arbitration procedures established in collective bargaining agreements between their unions and employers before suing their employers for claims that depend on interpretation of those agreements.

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[2] The Agreement based severance pay on the hourly "rate of pay", and the cost of living differential on "gross weekly earnings". Consistent with past practice known to the Union, the Company did not apply the differential to severance pay. The comprehensive wage and benefit schedule in the Agreement did not provide for deferral of first week's wages. A broad waiver and integration provision in the Agreement "superse[ded] all prior understandings, oral and written".

[3] The third question presented in the Petition at 31-34 (*ie.*, whether the District Court properly admitted the deposition testimony of the Union agreeing with the Company's interpretation of the Agreement) confirms that the employees' claims turn on an interpretation of the Agreement.

The Court answered this question affirmatively in *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965) ("*Republic Steel*"), and recently reiterated the exhaustion rule in *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985) ("*Allis-Chalmers*").

In *Allis-Chalmers*, the Court held that an employee's state tort suit for delay in making payments due under a collective bargaining agreement was preempted by Section 301 of the LMRA, *supra*, and should have been dismissed for failure to exhaust the grievance procedure in the agreement.

Cases which depend on the interpretation of collective bargaining agreements such as *Republic Steel* and *Allis-Chalmers* are distinct from cases which depend on statutory rights independent of the provisions of collective bargaining agreements, such as:

> *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 737-738, 741 nn. 13, 19 (1981) ("*Barrentine*") (claim that payment due for "principal" activities under Section 6 of the FLSA, *supra*, was independent of provisions of agreement);
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> *McDonald v. City of West Branch, Mich.*, 466 U.S. 284 (1984) ("*McDonald*") (rights and remedies against discharge in retaliation for exercise of First Amendment rights under 42 U.S.C. §1983 different than rights and remedies under agreement);
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> *Atchison, Topeka and Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 564-566 (1987) ("*Buell*") (Federal Employers' Liability Act, 45 U.S.C. §51 *et seq.*, protection against negligent conduct by employer and co-workers is independent of employer's

obligations, and limited relief apparently available, under agreement covered by the Railway Labor Act, 29 U.S.C. §151 *et seq.*, and distinct from claim based squarely on such agreement); and

Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399 (1988) ("*Lingle*") (claim for wrongful discharge in retaliation against exercise of state worker's compensation rights did not depend on interpretation of the agreement).

The Lower Courts Correctly Decided This Case

Exhaustion

Because the Employees' claim for additional payments turned on interpretation of the Agreement rather than a statute, *Republic Steel* and *Allis-Chalmers* required dismissal for failure to exhaust, and *Barrentine, McDonald, Buell,* and *Lingle* were distinct.

If the provisions of the Agreement did not provide for a cost of living differential on severance pay or deferred wages, then the Employees were not entitled to these additional payments. Neither Haw. Rev. Stat. §388, *supra,* nor Section 6 of the FLSA, *supra,* created such rights.

Merits

The Employees have not petitioned for review of the District Court's holding that the Agreement did not provide a cost of living differential on severance pay or deferral of first week's wages.

Timeliness

Even if Miura had claimed the Company violated the minimum wage provisions of Section 206 of the FLSA, *supra*, by paying her less than $1.40 for each hour which she worked during her first two week pay period in September 1967, then the two year statute of limitations for the FLSA in Section 6 of the Portal to Portal Act of 1947, 29 U.S.C. §255(a), would have barred her claim. There was no evidence that the Company made statements equitably estopping it from relying on her over 17 years of inaction.

The Employees Were Fairly Treated

The Employees timely received the $48,052.50 in severance pay which the Company, the Employees' Union and District Court agreed they deserved. The additional $7,224.00 differential on severance pay sought by the Employees exceeds the amounts received by their co-workers.

The Employees' Position Would Create Absurd Results

The Employees' proposed rule permitting suit for wage and benefit claims which turn on the interpretation of collective bargaining agreements would undermine traditional grievance and arbitration systems and impose a corresponding burden on the courts, inconsistent with the federal policy favoring arbitration under collective bargaining agreements. Section 201 of the LMRA, 29 U.S.C. §171.

CONCLUSION

For the above reasons, the Company respectfully requests the Court to deny the Employees' Petition for Writ of Certiorari.

Respectfully submitted,

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